

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE COURT OF THE DRAINAGE REFEREE

CITATION: Melidy v Holland Marsh Drainage System Joint Municipal Service Board, 2023 ONDR 6

DATE OF DECISION: 2023-02-25

FILE NUMBER: 2023-06

Court File No.: CV-21-00000414-0000 (Barrie)

B E T W E E N:

ANTHONY MELIDY and JACQUELINE TRACEY MELIDY
Applicants

- and -

HOLLAND MARSH DRAINAGE SYSTEM JOINT
MUNICIPAL SERVICE BOARD
Respondent

ACTING DRAINAGE REFEREE)
ANDREW C. WRIGHT) SATURDAY, THE 25th DAY
) OF FEBRUARY, 2023
)

ORDER

The Court of the Drainage Referee, having heard *viva voce* evidence of the parties on February 15th and 16th, 2023 and final submissions on February 17, 2023, for the reasons which follow:

THIS COURT ORDERS that:

Disposition

1. The Petition (Exhibit No.: 4) signed by the applicants and received by the Town on September 27, 2019 is a valid petition for the purposes of section 4 of the *Drainage Act*.

Definitions

2. For the purposes of this Order and the reasons therefor, unless the context requires a different meaning:
 - (a) the “2020 Tribunal Decision” means the decision issued on March 1, 2020 by the Tribunal in the case of *Anthony and Tracey Melidy v Municipality of Bradford West Gwillimbury* reported at 2020 ONAFRAAT 3 (CanLII)

- (b) the “Act” means the *Drainage Act*, R.S.O. 1990 Chapter D.17, as amended.
- (c) the “Board Of The Service Board” means the nine voting members who are to manage or supervise the management of the business and affairs of the Service Board as contemplated by the Agreement dated June 25, 2007 between the Town and the Township respect to the Holland Marsh Drainage System.
- (d) “Burnside Engineering” means R.J. Burnside & Associates Limited.
- (e) the “FOI” means the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, Chapter M.56, as amended.
- (f) the “Rules” means Regulation 232/15, being the Rules of Practice and Procedure in Proceedings Before The Referee.
- (g) the “Service Board” means the Holland Marsh Drainage System Joint Municipal Service Board, which was established under the authority of section 195 and subsection 202(1) of the *Municipal Act, 2001* by the Town and the Township with respect to the Holland Marsh Drainage System pursuant to the Agreement dated June 25, 2007 between the Town and the Township; the Service Board is a body corporate acting as the agent of the two municipalities, both jointly and severally.
- (h) the “Town” means The Corporation of the Town of Bradford West Gwillimbury.
- (i) the “Township” means The Corporation of the Township of King.
- (j) the “Tribunal” means the Agriculture, Food and Rural Affairs Appeal Tribunal.

Documents of Record

- 3. At the time of the hearing of *viva voce* evidence and final submissions, the following are part of the record:

	Decision of the Tribunal issued March 1, 2020 in the case of <i>Anthony and Tracey Melidy v Municipality of Bradford West Gwillimbury</i> reported at 2020 ONAFRAAT 3 (CanLII)
Exhibit No.: 1.	February 4, 2021 Letter Report issued by Burnside Engineering (Jeff Dickson, P.Eng.) and addressed to the Town (Ruth Westlake)
	Application, styled Notice of Appeal, dated March 16, 2021
	Amended Application
	March 5, 2022 Order issued March 6, 2022 by Andrew Wright, presiding Acting Drainage Referee
Exhibit No.: 2	May 17, 2004 Letter dated from Burnside Engineering (Gord Feniak, P.Eng.) addressed to the Town (Juanita Dampster-Evans)

<p>Exhibit No.: 3</p>	<p>April 25, 2022 Letter from Aird Berlis (Brian Chung) to the applicants with the following enclosures:</p> <ul style="list-style-type: none"> i. Notice of Appearance by Aird Berlis on behalf of the Town. ii. Town By-law 2007-090 authorizing the establishment of the Holland Marsh Drainage System Joint Municipal Service Board Agreement attached to which is the Agreement dated June 25, 2007 between the Town and the Township of King and executed by both municipalities that day delegating municipal authority with respect to the Holland Marsh. iii. Minutes of the meeting of the Town’s Committee of the Whole on November 5, 2013 recommending that Council delegate to the Service Board the control and management of municipal drains which lie outside the boundaries of the Holland Marsh Drainage System. iv. Minutes of the Town Council’s meeting on November 19, 2013 adopting resolutions from the Committee of the Whole Meeting on November 5, 2013. v. Town By-law 2013-107 enacted November 19, 2013 being a by-law adopting and confirming resolutions from the November 19, 2013 Council meeting. vi. Copy of the applicant’s FOI request. vii. A list of documents produced by the Town in response to that FOI request.
	<p>May 3, 2022 Order issued March 4, 2022 by Andrew Wright, presiding Acting Drainage Referee</p>
<p>Exhibit No.: 4</p>	<p>Petition signed by the applicants and received by the Town on September 27, 2019</p>
<p>Exhibit No.:5</p>	<p>Agenda for the June 11, 2020 meeting of the Board Of The Service Board</p>
<p>Exhibit No.: 6</p>	<p>Minutes of the June 11, 2020 meeting of the Board Of The Service Board (receiving 2020 Tribunal Decision)</p>
<p>Exhibit No.: 7</p>	<p>Agenda for August 20, 2020 meeting of the Board Of The Service Board</p>
<p>Exhibit No.: 8</p>	<p>Minutes of the August 20, 2020 meeting of the Board Of The Service Board (appointing Burnside Engineering)</p>
	<p>May 12, 2022 Order issued May 18, 2022 by Andrew Wright, presiding Acting Drainage Referee</p>
<p>Exhibit No.: 9</p>	<p>Witness Statement of Anthony Melidy dated June 18, 2022 with 69 attachments identified under Tabs 1 to 69</p>

	August 11, 2022 Order issued that day by Andrew Wright, presiding Drainage Referee
Exhibit No.: 10	Affidavit of Jeffrey Dickson, P.Eng., sworn August 31, 2022, with Exhibits A through K
Exhibit No.: 11	Affidavit of Frank Jonkman, sworn August 31, 2022, with Exhibits A through G, as re-sworn on September 14, 2022
	September 8, 2022 Order issued September 12, 2022 by Andrew Wright, presiding Drainage Referee
Exhibit No.: 12	Affidavit of Service sworn by Anthony Melidy on September 22, 2022 as to the giving of notice the November 17, 2022 case management video conference hearing
Exhibit No.: 13	Affidavit of Ruth Westlake sworn November 7, 2022 as to the posting on the Service Board’s website of documentation in accordance with the September 8, 2022 Order and the making of that documentation available for public inspection two Town office locations
Exhibit No.: 14	Consulting Services Agreement for the Provision of Professional Engineering Consulting Services (BWG20-052-P) dated August 19, 2020 between the Service Board and Burnside Engineering
Exhibit No.: 15	E-mail string that starts with a January 15, 2021 e-mail to Mr. Melidy from Ruth Westlake and ends with an e-mail from Mr. Dickson to Mr. Melidy on January 20, 2021.
	Decision of Referee S.L.Clunis in the case of <i>McKeen v. East Williams (Town)</i> issued May 31, 1966 and reported as 1966 ONDR 1 (CanLII)
	Decision of Referee Wm D. Turville in the case of <i>Westendorp v. Elizabethtown (Town)</i> issued June 2, 1986 and reported as 1986 ONDR 1 (CanLII)
	Decision of Referee Wm D. Turville in the case of <i>Jones v. Derby (Town)</i> issued December 8, 1986 and reported as 1986 ONDR 3 (CanLII)
	Decision of Referee D.A. O’Brien in the case of <i>Pannabecker v. West Wawanosh (Town)</i> issued June 12, 2000 and reported as 2000 ONDR 2 (CanLII)
	Decision of Referee D.A. O’Brien in the case of <i>M&M Farms v. Kingsville (Town)</i> issued September 29, 2004 and reported as 2004 ONDR 1 (CanLII)

4. The documents listed above are intended to reflect those things which would normally be filed in court or which would be used in the course of the hearing; it does not include but does not intend to dispense with routine items such as appearances, affidavits of service required by the court staff for filings such as the application, appearances, any motions and routine affidavits of service for supporting affidavits.

Costs and Expenses

5. It is ordered that all costs and expenses of the Town and of the Service Board in connection with the 2020 Tribunal Decision and the hearing leading to it and in connection with this application in the court of the Drainage Referee are to be paid out of the general funds of the Service Board. It is also ordered that no part of such costs and expenses of the Town and of the Service Board are to be charged under subsection 10(4) or under section 40 or under section 43 of the Act to the applicants as petitioners in the event a *Drainage Act* project does not proceed and no part of such costs and expenses are to be charged to the resulting *Drainage Act* project if it does proceed.
6. In the circumstances that the Service Board for itself and as agent for the Town did not produce documentation to the applicants as required by the Rules and by Orders of this court such that the applicants took recourse to the FOI to obtain production, the Service Board will forthwith reimburse the applicants for all money paid by them to the Town or to the Service Board for production under the FOI and it is ordered that such reimbursement is to be paid out of the general funds of the Service Board. It is also ordered that no part of such reimbursement is to be charged under subsection 10(4) or under section 40 or under section 43 of the Act to the applicants as petitioners and no part of such costs and expenses are to be charged to the resulting *Drainage Act* project if it does proceed.
7. Any amounts already charged or invoiced to the applicants as petitioners under subsection 9(4) of the Act will be charged to the resulting *Drainage Act* project and any amounts paid by the applicants in that connection will be refunded forthwith by the Service Board. In the event that there is no *Drainage Act* project, any amounts charged or invoiced to the applicants as petitioners under subsection 9(4) of the Act will be regarded as costs and expenses of the Service Board in connection with this application to which paragraph 5 au-dessus shall apply *mutatis mutandis*.
8. The applicants are entitled to their costs of this proceeding, on a partial indemnity basis, payable by the Service Board; and, if the parties are unable to agree, each party may make brief written submissions to the presiding Acting Drainage Referee within 30 days. Any amount paid in the way of costs by the Service Board to the applicants will be regarded as costs and expenses of the Service Board in connection with this application to which paragraph 5 au-dessus shall apply *mutatis mutandis*.

Dated at London this 25th day of February 2023.

Andrew C. Wright
Acting Drainage Referee

REASONS

Background

1. The applicants, Anthony and Tracey Melidy, own and reside in a single-family home municipally known as 122 Ondrey Street, Bradford; it is located in the Town of Bradford West Gwillimbury and is lot 10, Plan 51M-354. The applicants have a drainage problem as determined by the Tribunal in 2020 in the case of *Anthony and Tracey Melidy v Municipality of Bradford West Gwillimbury* reported at 2020 ONAFRAAT 3 (CanLII).
2. The respondent is a Service Board established in June of 2007 under the authority of section 195 and subsection 202(1) of the *Municipal Act, 2001* by the Town and the Township of King with respect to the Holland Marsh Drainage System. The Service Board is a body corporate acting as the agent of the two municipalities, both jointly and severally. The Service Board's delegated authority under the 2007 Agreement establishing the Service Board is at length and in detail but the salient element was that the Service Board's authority was limited to the Holland Marsh Drainage System.
3. The Holland Marsh drainage works are a major drainage system that enables the productive agricultural use of a particularly fertile area that straddles the two municipalities. The Holland Marsh Drainage Scheme, consisting of canals and dykes constructed around the Marsh, drained the swamp which exposed the fertile Marsh grounds that farmers have been using since the early 1900's. The Marsh occupies approximately 2,833 hectares and is primarily organic soils. The canal and dyke system is 28 kilometres and circles the marsh, acting to keep stormwater and upstream drainage from entering the marsh.
4. The applicants' property and the residential subdivision within which it is located have nothing to do with the Holland Marsh Drainage System; they are not located within the Holland Marsh.
5. In November 2013, the Town delegated to the Service Board "authority for the control and management of all municipal drains within the geographic boundaries of the Township of King and the Town of Bradford West Gwillimbury, which are outside the boundary of the Holland Marsh Drainage System, whether now existing or which are created in the future". Given this 2013 delegation of authority to the Service Board, there is no satisfactory explanation of how the Town came to be the party to and to be represented by counsel in 2020 before the Tribunal in the case referred to in paragraph 1 au-dessus. Be that as it may, the Town and the Service Board are bound by the result of that 2020 Tribunal Decision; and, in this case before the Court of the Drainage Referee, the Service Board is agent for and is the Town's voice.
6. The applicants' house was constructed in the early 1990's. Originally the house did not have a sump pump, but the previous owner installed one with the discharge going to the sanitary sewers on Ondrey Street. The applicants moved into their home after purchasing it in 1995. They had basement flooding in February 1996 when the sump pump failed. The applicants took steps to deal with the situation by the installation of exterior weeping tiles and a sump pump with flow monitoring in the basement. By 2003 the Town put a stop to the practice in the subdivision of sump pumps discharging to sanitary sewers.

Thereafter, the Melidy sump pump discharged to a swale or gutter beside the house on the east side, then to the driveway and thence, the discharge water ran on the surface to and down the driveway and then onto the street and into a catch basin from which it entered the Town's storm sewers. Shortly thereafter, in 2003 or 2004, the Town issued a Property Standards Order against the applicants to discontinue discharging their sump pump onto the road surface in freezing weather conditions as it had caused icing problems. Thereafter, during warm weather, the applicants continued to discharge to the surface, into the gutter/swale at the east side of the house, down the driveway and onto the street and, in freezing weather, the applicants changed the sump pump discharge into the sanitary sewer. Mr. Melidy gave evidence that this discharge to the sanitary in freezing weather conditions was being done with the knowledge of the Town. While I am sure the Town policy has not changed, allowing this temporary discharge for a month or so each year is a pragmatic exercise of administrative discretion, of which I approve.

7. There has been no flooding of the Melidy basement since the 1996 sump pump failure, but the Melidy sump pump runs routinely and discharges large amounts of water from time to time which correlate to precipitation events.
8. The applicants petitioned for a *Drainage Act* solution in September 2019. Initially, the request was in the form of a letter dated September 18, 2019, addressed to the Town in which the applicants identified that they owned at least 60% of the land in the area. There was no mention of what other lands may be in the "area".
9. On September 27, 2019, the applicants submitted a formal Form 1 Petition for Drainage Works by Owners. This form was prepared with the assistance of Town staff, who provided the forms and identified the area requiring drainage as the rear yards of 122 and 126 Ondrey Street, also known as lot 10, Plan 51M-354 and lot 21, Plan 51M-210, respectively. I regard the letter of September 18th, with its attachments, as accompanying and forming part of the September 27th Form 1 petition.
10. On October 10, 2019, their petition was denied and the applicants appealed to the Tribunal under subsection 5(2) of the *Drainage Act*. It is not the purpose of this proceeding to re-litigate what was before the Tribunal. Some information has been provided to give background and context, but I accept the Tribunal's finding in the following paragraph from its decision:

Mr. Melidy provided significant detail and measured impacts to accurately identify the drainage issues on his property from the neighbour's surface water. His evidence included pictures of where water pools on his neighbour's property, results set out in graphs and tables from a smart outlet he installed on his sump pump, Simcoe County aerial maps showing elevations as well as photographs he has taken demonstrating a hole in his driveway. He has gone beyond simply stating he has a drainage problem and went to great efforts to quantify the significance of the issue. The Municipality called no evidence to the contrary. The Tribunal finds that the Appellants have established they have a drainage issue.

Appointment of Engineer

11. The Tribunal allowed the applicants' appeal and ordered the Town to accept the petition and appoint an engineer. That decision was issued on March 1, 2020. On June 11, 2020, the Service Board accepted the petition and, on August 20, 2020, appointed Burnside Engineering to examine the area and prepare a report pursuant to the *Drainage Act*. At the time, the Service Board had just awarded Burnside Engineering a three-year Consulting Services Agreement for the Provision of Professional Engineering Consulting Services (BWG20-052-P) dated August 20, 2020.
12. Jeff Dickson, P.Eng. was designated by Burnside Engineering to undertake the examination and prepare a report requested by the Service Board. Mr. Dickson was the Burnside Engineering project manager identified in the August 20, 2020, Consulting Services Agreement.
13. There was a September 14, 2020 meeting between Mr. Dickson and Mr. Jonkman. Mr. Jonkman is the Drainage Superintendent for the Town and for the Township of King and, by implication, serves that function for the Service Board. He also holds the position of Stormwater Manager for the Town. He was a witness for the Town at the Tribunal hearing in February 2020 and was present throughout that hearing. He also gave evidence in this case before the Court of the Drainage Referee.
14. Mr. Dickson's notes from the September 14, 2020 meeting reflect a review of the 122 Ondrey Street location including that there is a 300 millimetre storm sewer in Ondrey Street with a catch basin at the gutter line. There was a preliminary review of flows in the subdivision block in which the applicants' house is located. There is reference to the Town owned utilities corridor to the west in which is located a watercourse and where that water course outlets. There is, at the end of the notes, mention of a review of the Town's historical "not BWG problem" outlook and the Town's CAO idea that the Melidy situation was a "Civil Matter".
15. While the Consulting Services Agreement was executed on August 20, 2020, it was not until September 22, 2020 that the Service Board formally advised Mr. Dickson of the Burnside Engineering appointment by letter. On September 29, 2020 Mr. Dickson acknowledged that appointment via e-mailed letter. Mr. Dickson was not present at any time during the Tribunal hearing in February 2020.

On-Site Meeting

16. An "on-site meeting" was convened on October 29, 2020 at the Melidy property at 122 Ondrey Street. After something less than an hour, the meeting adjourned to the Bradford Community Centre where it continued for another hour or two. The move to the Community Centre was a reflection of the adverse weather conditions of the day.
17. Those present at the "on-site" meeting were the Melidy's, Mr. Dickson, Mr. Jonkman, a Mr. Coleman who was a representative of the Town, and Ruth

Westlake who is the Service Board Coordinator. The on-site meeting included an inspection of the 122 Ondrey Street property before the meeting relocated to the Community Centre.

18. Mr. Dickson prepared and produced as part of his affidavit evidence a memorandum he had prepared as to what transpired. Mr. Melidy recorded that part of the meeting at the Bradford Community Centre and produced the recording and transcripts of portions of it.
19. There is really no great divergence between them about what transpired. The following summary is not necessarily in the order in which the meeting progressed, and I have amalgamated subjects together, though they may have occurred at different stages of the meeting. I have also added some editorializing and mentioned evidence before me, which has a bearing on what occurred during the on-site meeting. The following is my summary:
 - (a) Mr. Jonkman opened the meeting and, after introducing Mr. Dickson, turn it over to him. Mr. Dickson talked about the purpose of the on-site meeting and explained about the *Drainage Act* and the Service Board's role.
 - (b) Those present viewed the Melidy backyard at 126 Ondrey Street.
 - (c) Mr. Melidy described the water pumped by his sump pump and damage done to his driveway and erosion under his attached garage. The elevation of the Melidy property was noted as being higher than the neighbour to the east and he, Mr. Melidy, explained that he didn't want to change that situation. Mr. Melidy explained that the Town owned utilities corridor to the west at times fills and overflows up to the Melidy property and Mr. Melidy expressed concern about future flooding from that source.
 - (d) The evidence before me is that there is a Town-owned utility corridor that abuts on the part of the west boundary of the Melidy property. It is often referred to as a Hydro corridor because there is a hydro easement along it. There is also a watercourse which runs along it; the watercourse drains a much larger area and is the outlet for at least one stormwater management pond for another subdivision elsewhere but upstream of the Melidy property. There is also a public walking path along the corridor.
 - (e) During the on-site meeting, Mr. Melidy offered suggestions about drainage works. He proposed a catchbasin in the front yard of his property with a lateral to the rear of the Melidy house in his east side yard or on the boundary between his property and the property of Jose Araujo at 126 Ondrey Street, immediately to the east of the Melidy property. He proposed the installation of the lateral by horizontal boring.
 - (f) Mr. Melidy described the cavity below his driveway and under the garage and how he had had to repair the driveway. He attributed the situation to erosion.

- (g) Mr. Melidy also mentioned the basement flooding in 1996 when the sump pump failed and described the steps he had taken after the 1996 basement flooding. Mr. Melidy described the need for a sump pump to keep his basement dry. He gave examples of the volumes pumped. He concluded that, in his view, his whole basement, driveway and garage are the area that requires drainage.
- (h) Mr. Melidy explained that his property was not graded according to the grading plan which the Town had for the subdivision and that his property is higher than the Araujo property next door to the east and that water sits in the Araujo yard until it evaporates or infiltrates and that the infiltrated groundwater enters his weeping tile and needs to be pumped out.
- (i) Mr. Dickson talked about steps for determining whether the petition was valid. He discussed his interpretation of “area requiring drainage” and drainage area or watershed. He spoke of the area requiring drainage in terms of a saucer for a teacup – the classical “saucer” or “bowl” approach. Mr. Dickson also referred to sections 9 and 11 of the *Drainage Act*. He explained about allowances under the *Drainage Act*. Mr. Dickson explained that, if the petition is valid, the next step would be to decide if they wished a preliminary report or final report. Mr. Dickson provided an explanation of both reports and the process in completing each report.
- (j) With respect to possible drainage works, Mr. Dickson advised that, before specific drainage projects could be developed, soil investigations would need to be undertaken and that he would need to collect any soil reports that may have been completed in the past.
- (k) As mentioned, Mr. Melidy indicated his preference for a catch basin tied into the storm sewer at the front of his property with a lateral along the side of his house to his backyard with a “Y” connection into which the neighbour to the east could connect if he decided to. Mr. Melidy said he had an estimate of \$25,000 from the Mayor for this option. Mr. Melidy advised that he would prefer a 6-inch lateral to be horizontally bored. I observe that the \$25,000 figure is now dated, and new estimates will be required if an option such as this is to be pursued.
- (l) Mr. Dickson talked about challenges with directional drilling, the prospect that the street may need to be opened up and the cost factor of directional drilling. Mr. Dickson expressed concern that a 6-inch pipe might not be large enough and thought a 10- to 12-inch pipe would be appropriate for inspection; Mr. Dickson also had reservations about the capacity of the storm sewers to handle the volume. Mr. Dickson explained the standard design for rural property is 1 inch to 1½ inches of precipitation in a 24-hour period but said that, in an urban context, the standard for stormwater management design was the 5-year return storm event. Mr. Dickson also mentioned a 10-year return storm event. Mr. Dickson provided no explanation or substantiation for his opinions about pipe size or storm

sewer capacity. Mr. Melidy, who, for almost twenty years, had been discharging his sump pump to the storm sewer through a discharge hose that was less than 6 inches in diameter, and who has knowledge of in-pipe inspection cameras, was not deferential to Mr. Dickson's opinions.

- (m) In connection with a possible solution via the storm sewers and the costs of doing so, Mr. Dickson was unaware that the Town was planning work on Ondrey Street in 2021, i.e. the following construction season. Mr. Coleman was able to confirm that such road work was scheduled under the Town's capital project for Southeast Road rehabilitation. This would have reduced costs associated with road work had it been undertaken in coordination with the municipal capital works.
- (n) Mr. Dickson suggested that it would be more cost-effective to regrade the Melidy backyard to an outlet to the utility corridor to the west or to create a low-flow channel to the utility corridor. From my reading of his notes from the on-site meeting, I have the impression that Mr. Dickson is predisposed to having the outlet flow to the utility corridor. Mr. Melidy advised that he does not want to lower his property or to cut in a swale across it because the existing watercourse in that corridor already comes up to his property during storm events and any lowering of his property will make it worse. Mr. Melidy also pointed out that the Araujo property to the east at 126 Ondrey Street was lower than his property at 122 Ondrey Street so that it would take a significant lowering or a deep swale to get water from 126 Ondrey Street to flow to the utility corridor to the west.
- (o) During his evidence before me, Mr. Jonkman said that in 2021, there was a clean-out of sediment buildup in the utility corridor water course as well as in a stormwater management pond which outlets to that watercourse. It was not a deepening of the watercourse but rather a restoration of its originally designed condition. That information would not have been available for the October 2020 on-site meeting, but it gives credence to Mr. Melidy's concerns about past and potential future overflows.
- (p) Mrs. Melidy sensibly suggested that topographical surveying needs to be completed prior to drainage solutions being discussed in detail.
- (q) Mr. Dickson then tried to dissuade the Melidy's from proceeding under the *Drainage Act*. He said there were more cost-effective ways than using the *Drainage Act* with its rigorous process and associated costs. In this connection Mr. Dickson referred to costs of another project the engineering costs of which were \$100,000 for a project costing in the range of \$350,000 to \$400,000. During the hearing before me, when Mr. Melidy produced the report for that project, Mr. Dickson said it was entirely unlike and not at all comparable to the current situation which, of course, makes Mr. Melidy's point that numbers of that magnitude were an irrelevant exaggeration.
- (r) Mr. Dickson then proposed that the Melidy's withdraw the petition and explore alternative solutions by working with the Town, noting that

another petition could be filed if no solution can be found with the Town. Mr. Melidy expressed his frustration with being rebuffed and obstructed by the Town since 2004 and said he had no confidence in the Town or the prospect of finding solutions with the Town.

- (s) Finally, Mr. Dickson suggested that Mr. Melidy research and investigate more information about Mutual Drainage Agreements. Perhaps on October 29, 2020 Mr. Dickson was unaware of what Mr. Jonkman heard from Mr. Araujo the next day. When Mr. Jonkman met with Mr. Araujo on October 30th, Mr. Araujo was adamant that he had no drainage problems on his property at 126 Ondrey Street and wanted nothing to do with the Melidy's or their petition. Mr. Melidy was aware of his neighbour's mind-set and said so.
- (t) My final observation is that, at the on-site meeting, there was no discussion of the area requiring drainage on the Araujo property at 126 Ondrey Street. Mr. Dickson made no inquiry of Mr. Melidy for clarification of or explanation about the topographical data and contour mapping of the rear yard of the Araujo property at 126 Ondrey Street. That data and mapping accompanied the petition and was part of the evidence before the Tribunal in 2020. There is no reference in Mr. Dickson's notes to that topographical data and contour mapping.

20. I pause to add some information about 126 Ondrey Street, the other property referred to in the September 27, 2019 Form Petition prepared with assistance from the Town; it is lot 21, Plan 51M-210. That property is also a single-family dwelling on the residential lot abutting on the northeast side of the Melidy lot at 122 Ondrey Street. 126 Ondrey Street is owned by José Carlos Araujo. Mr. Araujo's evidence is that, after Mr. Melidy built up his property with a sidewalk, railway ties and concrete slabs between the two houses, he, Mr. Araujo, moved a fence on his property and constructed a gutter beside the sidewalk in the west sideyard of 126 Ondrey Street to carry surface water from his rear yard to the street and the Town's storm sewers. This was done in September of 2015 and since then Mr. Araujo says he has had no problems with water drainage. The Tribunal in its decision does not make any finding, one way or the other, about whether there is a drainage issue for the 126 Ondrey Street property. Neither Mr. Araujo nor any representative of Mr. Araujo was involved in the Tribunal proceeding in 2020 nor the October 29, 2020 on-site meeting. Mr. Dickson had no communication with Mr. Araujo before completing his investigation and issuing his report to the Service Board. That said, Mr. Dickson had advice from Mr. Jonkman months before issuing his report in a November 25, 2020 e-mail that Mr. Araujo denied having any drainage issues. Mr. Jonkman in his evidence before me described a meeting he had with Mr. Araujo at the Town offices on October 30, 2020 which was the basis of Mr. Jonkman's November 25th e-mail report to Mr. Dickson.

Engineer's Determination That Petition is Not Valid

21. I will return to the details, but suffice it to say here that Mr. Dickson's report to the Service Board was in the form of a letter (the "**Dickson Letter**") issued on February 4, 2021, in which he concluded that the Melidy petition was not valid. It is from that letter that this proceeding was commenced. Mr. Melidy, who is a self-represented layperson, cast it as an appeal of the February 4, 2021 letter, but in this process in the Court of the Drainage Referee, the so-called appeal has been treated as an application to determine the validity of the petition.
22. The validity of a petition turns on section 4 of the *Drainage Act* which is as follows:

Petition

- 4(1) A petition for the drainage by means of a drainage works of an area requiring drainage as described in the petition may be filed with the clerk of the local municipality in which the area is situate by,
- (a) the majority in number of the owners, as shown by the last revised assessment roll of lands in the area, including the owners of any roads in the area;
 - (b) the owner or owners, as shown by the last revised assessment roll, of lands in the area representing at least 60 per cent of the hectarage in the area;
 - (c) where a drainage works is required for a road or part thereof, the engineer, road superintendent or person having jurisdiction over such road or part, despite subsection 61(5);
 - (d) where a drainage works is required for the drainage of lands used for agricultural purposes, the Director. R.S.O. 1990, c. D.17, s. 4(1).

Form of petition

- 4(2) A petition under subsection (1) shall be in the form prescribed by the regulations and, where it is filed by an owner or owners under clause (1) (a) or (b), shall be signed by such owner or owners. R.S.O. 1990, c. D.17, s. 4(2).

Petition where area lies on each side of boundary line

- 4(3) Where it is desired to construct a drainage works for the drainage of an area composed of lands or roads lying on each side of a boundary line between two or more local municipalities, the council of any of them may proceed upon a petition as required by this Act in all respects, including the sending of notices, as if such area were entirely within the limits of the municipality. R.S.O. 1990, c. D.17, s. 4(3).

Person deemed owner

4(4) Where a person who is the owner of land, but does not appear by the last revised assessment roll of the municipality to be the owner, is a petitioner, the person shall be deemed an owner if the person's ownership is proved to the satisfaction of the clerk, and, if the person who appears by the assessment roll to be the owner is a petitioner, the person's name shall be disregarded in determining the sufficiency of the petition. R.S.O. 1990, c. D.17, s. 4(4).

Persons jointly assessed

4(5) Where two or more persons are jointly assessed for a property, in determining the sufficiency of a petition, they shall be deemed to be one owner. R.S.O. 1990, c. D.17, s. 4(5).

23. Procedurally, the determination of the area requiring drainage and the validity of the petition is governed by section 9 of the Act, which provides as follows:

Determination of petition compliance

9(1) The engineer shall, before making an examination and report, cause the clerk of the local municipality to send at least seven days' notice in the form prescribed by the regulations to each owner of lands within the area requiring drainage as described in the petition and to each public utility that may be affected by the petition setting out the time and place of an on-site meeting with the engineer to examine the area. R.S.O. 1990, c. D.17, s. 9 (1); 2010, c. 16, Sched. 1, s. 2(5).

Duty of engineer

9(2) At the on-site meeting, the engineer shall,

- (a) determine the area requiring drainage;
- (b) determine whether the petition complies with section 4 for the area requiring drainage; and
- (c) where the engineer is of opinion that the petition fails to so comply, establish the requirements for a petition to comply with section 4. R.S.O. 1990, c. D.17, s. 9(2).

Idem

9(3) Where the engineer is of opinion that the petition complies with section 4, the engineer shall proceed to prepare a report or a preliminary report, as the case may be. R.S.O. 1990, c. D.17, s. 9(3).

Report of engineer

9(4) Where the engineer is of opinion that the petition does not comply with section 4, the engineer shall so report to the council of the initiating municipality stating wherein the petition is deficient, the amount of the engineer's fees and by whom they shall be paid, and the council shall forthwith send a copy of such opinion to each petitioner. R.S.O. 1990, c. D.17, s. 9(4).

Fees to form part of costs

9(5) Where, within sixty days of the engineer's reporting to council under subsection (4), a petition that complies with the requirements of section 4 is filed with the clerk of the council,

(a) the council shall instruct the engineer to prepare a report, or a preliminary report, as the case may be; and

(b) (the fees mentioned in subsection (4) shall form part of the cost of the drainage works. R.S.O. 1990, c. D.17, s. 9(5).

24. So, in the first instance, it is the appointed engineer who is to determine the area requiring drainage for the purposes of a section 4 petition and to determine the validity of the petition. I say in the first instance because, pursuant to clause subsection 106(1)(b) of the Act, the Court of the Drainage Referee has jurisdiction to determine the validity of, or to confirm, set aside or amend any petition, resolution of a council, provisional by-law or by-law relating to a drainage works under this Act or a predecessor of this Act.
25. That said, the Referee will give deference to the opinions of engineers in such matters. With that in mind, during the March 5, 2022 case management video conference, the presiding Referee said the following between transcript line 334 and line 535:

Now I'm going to come back, Mr. Melidy, to your case.

RJ Burnside is a well-respected engineering firm. Jeff Dixon is a well-respected, seasoned drainage engineer.

I may have some concerns and in the absence of any information about how it happened, I do have some questions about his appointment and whether it was a precondition of that appointment that he had a certain opinion about this because engineers are supposed to be independent. And that goes to the weight that I would give his opinion evidence.

But, if that's the only engineering opinion evidence I have, the case that I have to deal with, is the petition valid and is the validity of the petition? Which has to do with a determination of what the area requiring drainage is. And I'm a lawyer by trade. I'm a retired lawyer by trade. I was a lawyer for 45 years. But the area requiring drainage question is an engineering question. And if you do not have a drainage engineer giving evidence that favours your view that your property is the only property requiring drainage, and that, therefore, your signature and your wife's signature are sufficient to make the petition valid in the absence of a different engineering opinion that supports your point of view, I'm going to have little choice but to accept the evidence of Jeff Dixon.

So, I'm saying to you in the clearest terms that, if you don't have a drainage engineer to help your cause, you need to.

I'm going to offer you the name of a person at the Ministry of Agriculture and Food and Rural Affairs who can point you to a list of drainage engineers that you might wish to consult with. Do you want me to write it down or do you want me to send it to you by email when we finish?

And the presiding Referee continued at line 419 to line 453 of the transcript:

I guess, Mr. Melidy, if when you speak to the Ministry and you get a list of engineers and, if it's simply a matter of time, I can give you the time so long as you're moving forward.

If none of the engineers can look at your case until the Fall because they're busy all summer, then we would set a date in the Fall to have a status report and see what you're doing. If, however, you find that you cannot, from the list of engineers in the province, find an engineer who, having considered your case, you find that you can't get some engineer to support your view then I fear for the result of your case.

There are very few occasions - as I said, I practiced for 45 years and spent a lot of time doing administered tribunal hearing work, mostly in the land use planning area, but in other areas as well such as Energy Board and Environmental Appeal Tribunal and I did some of this Referee work, very little, but some of the work before the Referee and the Tribunal. But in that time, I can think of only two occasions where an expert was cross examined so thoroughly that the tribunal decided against their opinion in the absence of an opposing opinion. It is extremely rare.

The one situation was such that the decision maker said, in effect, the appellant doesn't need to have the answers. The appellant is entitled to ask good questions, and it's the responsibility of the respondent to provide good answers. And in that case, the answers were so bad that they just didn't accept the answers from the expert. But that's one in 45 years, and I predict that, well, I have some reservations from what I see about Mr. Dixon but he's a seasoned engineer, and it will be difficult for me to find against him in the absence of some comparable evidence to the contrary.

Mr. Meliday said:

But, Sir, I studied science. I understand how gravity works. When somebody says that a point 18 or 20 inches higher than the outlet should be part of the drainage area, but parts that are lower shouldn't be. It doesn't really require a PhD in physics or engineering to understand it. I have references to case law and all kinds of things. I prepared stuff for the Professional Engineers, Ontario. It's well documented.

The presiding Referee continued:

Okay. I'm just describing the hurdle that you have to get over.

To which Mr. Melidy replied:

Understood. And I wish I didn't have to, Sir. I wish I did have an engineer.

26. That was on March 5, 2022 and the case was put over to May 4, 2022 to give the applicants time to retain and brief a drainage engineer. Under the Act the definition of engineer includes not only a person registered under the *Professional Engineers Act* but also a surveyor registered under the *Surveyors Act*. At the May 4, 2022 case management

video conference, Mr. Melidy advised that he was proceeding without an engineering or surveyor witness.

27. Mr. Melidy is not qualified as an engineer or a surveyor. He has a science degree and has worked in the computer science field and was engaged in the early development of search engines and the internet. In that work, he was required to understand quickly the business and systems of diverse customers and clients; he is a quick study of new, diverse and complex matters. He is self-taught and enjoys the challenge of learning about and mastering skills in varied fields of interest beyond computers ranging from building a wooden canoe to auto mechanics to dressmaking and house construction and repair. What he has learned about drainage and the *Drainage Act* is also self-taught, and he has become a very knowledgeable layman.
28. Since the 1996 flooding of their basement, the Melidy's have not retained an engineer, hydrologist, hydrogeologist or other soils expert or a surveyor to study the drainage issues or to prepare a report. With respect to retaining an engineer or surveyor as an expert witness in this case, Mr. Melidy told the court that he had approached a number of engineers and surveyors, and he advised the court that none were prepared to accept a retainer adverse in interest to the Town and Service Board.
29. I am now going to review the Dickson Letter and its conclusions, but before doing so, I wish to comment that, as I was initially familiarizing myself with this case, I was concerned because the Dickson Letter replicates the Town counsel's submissions to the Tribunal in February 2020. The Tribunal's March 1, 2020 decision includes the following:

In cross examination of Mr. Melidy and in closing argument, counsel for the Municipality suggested that the Melidys will not meet the threshold requirements of s.4(1) of the *Drainage Act*. Counsel suggested that the drainage issue is on the neighbouring property and that the Melidy land will not represent 60 percent of the hectarage requiring drainage.

While the Tribunal acknowledges that Section 4(1) does create statutory thresholds for a legally valid petition, the Tribunal makes no finding in that regard as the determination of the area requiring drainage and the validity of the petition must be made by an Engineer appointed under Section 8 of the Act.
30. Mr. Jonkman gave evidence before the Tribunal, and, in his evidence before me, he said he did not, in his evidence to the Tribunal, speak to the question of the validity of the petition or area requiring drainage. Mr. Dickson was not present at the Tribunal hearing. There was no evidence to support counsel's submission to the Tribunal. The same lawyer was acting for the Service Board at the time of the Dickson Letter. In the early stage of this hearing process, there was no indication of any competitive procurement process by which Mr. Dickson was retained. In those circumstances and because the Dickson Letter echoes counsel's submissions to the Tribunal in February 2020, I was troubled about Mr. Dickson's impartiality as required by section 11 of the Act.

31. As the evidence has come forward before me, it appears that the Service Board had decided to secure the services of a drainage engineering firm for its engineering requirements. At its June 11, 2020, meeting the Service Board decided to proceed with a Request for Proposals (“RFP”) for a drainage engineer on the basis of a three-year contract. This was the same meeting at which the Service Board accepted the Melidy petition as directed by the Tribunal.
32. With respect to the RFP, a staff report was made to the Service Board by Mr. Jonkman outlining the reasoning for this approach. In general terms, the Service Board was aware that it would need an engineer for the Melidy petition, and the Service Board was anticipating that other *Drainage Act* work would arise. The rationale for the consulting contract was that a drainage engineering agreement would create efficiencies by eliminating the need to go through the procurement process on an *ad hoc* basis every time professional engineering services were required under the *Drainage Act*. Prior to the Melidy petition, the last engineer appointment made by the Service Board was for a petition drain in January 2019 when the Service Board had gone to market for the single drain. It was Mr. Jonkman’s evidence that the RFP was precipitated by the Melidy petition and the Tribunal decision, but it was a separate exercise.
33. A Request for Proposals was issued in accordance with the Town and the Service Board’s procurement policies. The request was for an engineering firm with experience under the *Drainage Act* to be available to provide such *Drainage Act*-related services as required by the Service Board from time to time. The contract was to be for a three-year term. Burnside Engineering was the successful candidate, and in the Burnside Engineering submission, Mr. Dickson was identified as the project manager.
34. The Consulting contract is a fairly lengthy formal agreement but the salient elements of it for the purposes of this case are as follows:
 - (a) It is for Professional Engineering Services for Drainage Works pursuant to the Ontario *Drainage Act*, which in my view, includes section 11 of the Act even though that section is not specifically referred to.
 - (b) There are hourly rates for the engineers working as assigned on Service Board work but there is no fee or charge for Burnside Engineering to be on stand-by. It is not as if the Service Board was hiring a salaried in-house engineer by contract.
 - (c) While Burnside Engineering is committed to not accepting work which would put them in conflict, pursuant to paragraph 3.1.8 of the Agreement, the Service Board is not committed to using Burnside Engineering exclusively for *Drainage Act* work.
35. On August 20, 2020, the Service Board authorized the three-year contract with Burnside Engineering, which had already been signed by Burnside Engineering on August 19, 2020. At the same meeting, the Service Board appointed Burnside Engineering to deal with the Melidy petition by examining the area and preparing a report.

36. I am satisfied from the evidence I have heard that there were no discussions of the Melidy petition between Service Board staff and Burnside Engineering during the request for proposal process, which ended when the contract was concluded with Burnside Engineering on August 20, 2020, and that Burnside Engineering was not made aware of any potential appointments until the appointment was made. I am satisfied that, after the Burnside Engineering appointment was made with respect to the Melidy petition, there was no communication between Mr. Dickson and legal counsel for the Service Board about the Melidy petition before the Dickson Letter was issued on February 4, 2021. In short, I am satisfied that Mr. Dickson was not retained on the basis that he had already prejudged the matter to accord with counsel's submissions to the Tribunal.
37. Mr. Melidy, in his evidence, agreed that there was no evidence of fraud or misfeasance or professional negligence concerning Mr. Dickson.
38. The evidence is that Mr. Dickson was aware of the submissions, unsupported by any evidence, made by counsel for the Town to the Tribunal in February 2020 about the validity of the petition, as referred to in paragraph 29 au-dessus. Because the Dickson Letter so closely aligns with that submission, I am concerned that he was swayed by it to some degree. Again, Mr. Dickson was informed about, but I do not believe he was influenced by the reported opinions of the Town CAO mentioned during the September 14, 2020, meeting with Service Board staff and referred to in paragraphs 13 and 14 au-dessus.

Engineer's Rational for Determination Petition Not Valid

39. Returning now to a review of the Dickson Letter and its conclusions, Mr. Dickson determined that the "area requiring drainage" was the basement of the residential dwelling located at 122 Ondrey Street and all of the rear yard of the property identified as 126 Ondrey Street excluding a small shed, the patio attached to the rear of the house and a flower box at the back of the yard. He says that these two areas are of similar size and, accordingly, the signatures of the Melidy's fall short of the 60% requirement of subsection 4(1)(b). Mr. Dickson says that "this determination is based on an examination of the area and is supported by the evidence presented to the Tribunal."
40. Mr. Dickson was not present for the evidence presented to the Tribunal, but he relies on the evidence presented to the Tribunal. To that end, Mr. Dickson cites in the Dickson Letter extracts from the following paragraph in the March 1, 2020 Tribunal decision:
- Mr. Melidy and his wife, Tracey Melidy, are the owners of the property municipally described as 122 Ondrey Street. Mr. Melidy explained that water pools on the property of his neighbour to the northeast (126 Ondrey Street) and that creates surface and subsurface water flow to the northwest side of his house (near the back of his house). He testified this water flow has caused significant damage to his foundation as well as a hole under his driveway. Mr. Melidy testified that he has no water in his backyard.
41. While he says he is relying upon the evidence presented to the Tribunal, in fact Mr. Dickson ignores the unchallenged evidence given by Mr. Melidy to the

Tribunal about the information and data provided with the petition in September of 2019 and; instead, Mr. Dickson relies upon his own flawed interpretation of what the Tribunal's 2020 decision said. What the Tribunal was referring to when it said: "Mr. Melidy explained that water pools on the property of his neighbour to the northeast" was not the entire property or the entire front yard or the entire rear yard; the Tribunal was referring to the part of the property in the rear yard described by Mr. Melidy in his evidence and illustrated by his 2004 topographical information.

42. There is no map or plan attached to the Dickson Letter.
43. In his affidavit sworn on August 31, 2022, Mr. Dickson says that, in preparing the Dickson Letter, he had reference to Geographic Information Services (GIS) from Simcoe County to obtain schematics and measurements of the properties. Using that information source, Mr. Dickson determined that the area of the basement of Melidy's house at 122 Ondrey Street was 1,800 square feet. In his evidence before me, Mr. Dickson made the point that it was unusual for a basement to be considered to be part of an area requiring drainage and that, in his four decades of drainage engineering practice, he had never previously done so. I am unclear what I am to take from this, but Mr. Dickson could hardly have done otherwise, having regard for the decision of the Tribunal in March 2020.
44. Using the same County GIS source, Mr. Dickson determined that the rear yard of Mr. Araujo's house at 126 Ondrey Street, excluding the patio, flower box and shed, was 1,850 square feet. In his August 31, 2022 affidavit, Mr. Dickson concludes that the total area requiring drainage is 3,650 square feet and that the Melidy basement is less than 60% of that total. Mr. Dickson called this a "desktop" exercise.
45. Mr. Dickson made no on-site measurements to confirm the GIS information and made no inquiries of Mr. Melidy about what parts of the 126 Ondrey Street rear yard were referred to by Mr. Melidy when he gave evidence to the Tribunal.
46. As previously mentioned, Mr. Dickson had advice from Mr. Jonkman in a November 25, 2020 e-mail that Mr. Araujo denied having any drainage issues. Mr. Dickson made no inquiries of Mr. Araujo before issuing the Dickson Letter.
47. In his affidavit sworn November 30, 2022, and then when he gave evidence before me, Mr. Araujo said that, since September of 2015, when he removed a portion of the fence and installed a gutter in his west side yard, he had had no problems with water drainage on his property at 126 Ondrey Street. Again, this information about Mr. Araujo's opinion was known to Mr. Dickson since November 2021. When Mr. Araujo gave *viva voce* evidence, he made a poor witness. Part of the problem was that English is a second language for him, but he was also evasive and argumentative and deliberately unhelpful. Mr. Araujo and Mr. Melidy disagree about whether a couple of inches of ponded water is a problem, but it is clear that Mr. Araujo is satisfied with the current drainage state of affairs in his backyard. Mr. Dickson nonetheless concluded that, whether Mr. Araujo thought drainage of his property was required or desired, all of the rear yard behind the

Araujo house to his property boundaries (excluding the patio attached to the house and a small shed and flower box at the back of the yard) was part of the area requiring drainage.

48. Mr. Dickson did not use the topographical data and contour map provided by Mr. Melidy because he, Mr. Dickson, had not done that topographical survey. He said he had perused the 2004 topographical information provided by Mr. Melidy to the Tribunal about the elevations of the rear yard of the Araujo property at 126 Ondrey Street but did not use any of that information in his determination of the area requiring drainage. During the hearing before me, while Mr. Dickson was observing the hearing, Mr. Melidy told me about the methodology he used in 2004 to prepare the topographical data and resulting contour map; when Mr. Dickson was asked about the methodology, he allowed that it was basically sound. Before issuing the Dickson Letter Mr. Dickson did not ask Mr. Melidy for an explanation of those parts of the topographical data or contour map which he believed were unclear or which he did not understand. Mr. Dickson did not do any topographical survey work to establish any elevations. He did not do so, Mr. Dickson advised, because it is normally not done unless and until a petition is determined to be valid. Mr. Dickson has not observed surface water pooling in the rear yard at 126 Ondrey Street.

Applicants' Rational in Support of Petition Validity

49. I should digress to say that, before the hearing, Mr. Melidy provided his evidence in the form of an unsworn witness statement. After he was sworn before me, and after he had provided an errata list, he swore to me that his witness statement, as amended by his errata sheet, was true and correct to the best of his knowledge and belief.
50. Returning to his testimony before me, Mr. Melidy says that only a small area of the Araujo backyard is occasionally flooded for a short period before the water flows to the street via the Araujo sideyard gutter and driveway or evaporates or infiltrates to become part of the groundwater regime that enters his weeping tile. The point of the evidence he gave to the Tribunal was that surface water from the neighbourhood to the northeast was getting into the same groundwater that was getting into the weeping tile around his basement after first accumulating in the Araujo backyard at 126 Ondrey Street. Mr. Melidy's data shows a close relationship between precipitation and the water pumped by his sump pump. On this basis, in the absence of any hydrogeological evidence, the implication of the 2020 Tribunal Decision and the operating assumption of everyone is that there is linkage between ponded water in the Araujo back and side yard and the volume of discharge from the Melidy weeping tile next door.
51. For the purposes of this hearing, where the "area requiring drainage" is the issue, Mr. Melidy relies upon his 2004 topographical information about the rear yard at 126 Ondrey Street. This information was part of the evidence before the Tribunal; indeed, it was part of the applicants' petition submission in September 2019. Mr. Melidy explained to me that the topographical information was generated by him using a laser level on a tripod with measurements taken at 1-meter intervals across the fence line. It is not as sophisticated as using a laser equipped transit, but Mr. Dickson didn't criticize the methodology nor produce conflicting topographical information. Mr. Melidy says the Araujo rear yard is substantially the same now as it was in 2004.

52. The 2004 topographical information generated by Mr. Melidy was not challenged before the Tribunal. Mr. Dickson did not comment on or dispute that topographic information, he just ignored it; because he, Mr. Dickson, had not done it he says he could not rely upon it.
53. There is a distinction between the “area requiring drainage” for the purposes of section 4 of the Act and a watershed. The watershed is a larger area which contributes water to the area requiring drainage and includes the area requiring drainage. In this case the actual watershed will not be delineated in detail until some survey work has been done for an engineer’s report and that will not happen until the applicants’ petition is determined to be valid. That said, for the purposes of the giving of notice to those who may be affected by the result of this application, based on County GIS contour mapping, an educated estimate was made based on the notion that the watershed will be within a subdivision block bounded on the northwest by Simcoe Road, on the northeast by Zima Crescent and on the southeast by Ondrey Street. The fourth side of the subdivision block is the previously mentioned Town-owned utility corridor on the southwest. This utility easement already serves as a conduit for water run-off from a larger area, so it may not contribute much to the applicants’ drainage issue, but it is the west boundary of the subdivision block. Within that subdivision block, the lot grading and stormwater management plans will or should have been designed to cause much of the front yard drainage from each of the lots to flow to the storm sewers in the streets upon which the lots front, so it is likely that not all of any of the lots will be within the watershed, but it is equally likely that some of most of the lots will be.
54. Surface water from the lots in this subdivision block which does not go to the storm sewers in the streets upon which they front or evaporate or infiltrate, sheet flows toward the southwest where the Araujo and Melidy lots are located. This is shown on topographic information at two-meter intervals from the Simcoe County GIS system.
55. Mr. Melidy says his lot is higher than the Araujo lot so surface water accumulating in the rear yard of the Araujo property outlets to the Town storm sewers or evaporates or infiltrates; what infiltrates becomes part of the groundwater regime which is getting into the weeping tile of the Melidy house. Mr. Melidy says that he has no surface drainage problem in his rear yard. He says he has not altered the grade of his rear yard since moving in, with the exception that he placed fill under his deck located at the northeast corner of his house.
56. It is Mr. Melidy’s evidence that the outlet for surface water in the backyard of 126 Ondrey Street is the swale or gutter in the side yard of the Araujo property leading to the northwest end of the driveway at 126 Ondrey Street. This is the side yard between the Araujo house and the Melidy house. Mr. Melidy says that any accumulated surface water above the elevation of that gutter and driveway will flow onto the driveway, thence to the catchbasin in front of the Araujo property on Ondrey Street where it enters the Town’s storm sewer system. There is a relatively small area of the rear yard at 126 Ondrey Street, which is below the elevation of the gutter and driveway, and water pools in that low area until it evaporates or infiltrates. The maximum depth of that pooled water is about 4 inches in the deepest areas; in most areas it is less. It is that few inches of

occasionally ponded water about which Mr. Meliday told the Tribunal in February 2020 and to which the Tribunal was referring when it said: “Mr. Meliday explained that water pools on the property of his neighbour to the northeast”. As previously said, it was not the entire property or the entire front yard or the entire rear yard, the Tribunal was referring to the part of the rear yard described by Mr. Meliday in his evidence and illustrated by his 2004 topographical information which was part of the evidence before the Tribunal.

57. Mr. Meliday says that the area requiring drainage on 126 Ondrey Street property is that small part of the rear yard below the elevation of the Araujo gutter and driveway because any accumulated surface water below that elevation cannot get away via the driveway outlet. He says his observations of pooled water in the 126 Ondrey Street are consistent with the topographical measurements he has done. Mr. Meliday does not understand Mr. Araujo’s position that this ponded water is not a problem and perhaps it is not for Mr. Araujo, but it is for the Meliday’s when that ponded water infiltrates and becomes part of the groundwater regime which finds its way into the Meliday weeping tile.
58. Mr. Dickson, in his evidence at the hearing, raised for the first time the prospect that a portion of 130 Ondrey Street might need to be included as part of the area requiring drainage. 130 Ondrey Street is the next house to the east over from the Araujo property at 126 Ondrey Street. Mr. Dickson says it is an issue because the 2004 Meliday topographical map does not cross the boundary line to the east. In reply evidence, Mr. Meliday said that his topographical measurements were limited to the rear yard of 126 Ondrey Street because his methodology depended upon the fences on either side of the 126 Ondrey Street rear yard. Also, in his reply evidence, Mr. Meliday told the court that he had never seen water flooding any part of the rear or west side yard at 130 Ondrey Street, and the ponding in the 126 Ondrey Street rear yard is behind the raised, covered porch and on the west side and flows westerly toward the Meliday house at 122 Ondrey Street.
59. Mr. Meliday has provided a plan showing this area which follows irregular contour lines to the north and west bounded on the south by the Araujo house. It is to be recalled that Mr. Dickson’s area requiring drainage on the Araujo property at 126 Ondrey Street extends from the rear of the house to the property boundaries at the rear and side lot lines - less the covered porch at the rear of the house, the flower bed at the back and the small shed on raise pad next to the satellite dish.
60. Mr. Meliday has estimated that, excluding the raised covered patio at the rear of the Araujo house, about a third of the area in the rear yard of 126 Ondrey Street is below the elevation of the Araujo side yard gutter and driveway. He conservatively estimates the area to be less than 750 square feet. He says that is the area requiring drainage because surface water from the rest of the significantly higher area has outlet to the Town’s storm sewers.
61. Assuming Mr. Meliday is correct about the 750 square feet, when added to the 1,800 square feet of basement area of the Meliday’s house at 122 Ondrey Street, the total is

2,550 square feet, 60% of which is 1,530 square feet. On that basis, the Melidy property represents more than 60% of the area requiring drainage.

62. Mr. Melidy is strongly of the view that Mr. Dickson should have included in the area requiring drainage, his driveway and the area under his attached garage on account of the erosion in those locations. I need not and do not make a determination about those areas but, if those areas were also included, the area requiring drainage on 122 Ondrey Street, it would increase the margin in excess of 60%.

Engineer's Response about Area Requiring Drainage

63. Mr. Dickson said he looked at the two properties at 122 and 126 Ondrey Street at the time of the on-site meeting on October 29, 2020. He talked to the Melidy's at that time and then did a desktop determination of the area requiring drainage. He agreed that topographical contours were a better delimiter of an area requiring drainage than property boundaries but said he did not have any topographical contours upon which to rely. He, therefore, did a desktop assessment based on the County's GIS information. He took the whole of the Araujo rear yard property lines at 126 Ondrey Street less the covered porch at the rear of the house, the flower bed at the back and the small shed on a raised pad next to the satellite dish, all as identified on GIS mapping; for the Melidy basement at 122 Ondrey Street he took the roofline of the house less the attached garage, again as identified on GIS mapping. He was satisfied that this was sufficiently approximate for him to conclude about the area requiring drainage in the absence of topographical information and contours.
64. Throughout his involvement with the Melidy petition, Mr. Dickson has ignored the 2004 topographical data and contour map generated by Mr. Melidy. The Melidy topographical map and data is strange because it shows depths from an elevated benchmark so that higher elevations are assigned lower numbers – because they are not as deep below the benchmark – and lower elevations are assigned higher numbers. Normally topographical survey maps give elevations above a nominal sea level based on Canadian Geodetic Vertical Datum of 2013 (CGVD2013) or some equivalent, with higher numbers indicating higher elevations. As already mentioned, Mr. Dickson made no attempt to discuss with Mr. Melidy his data or his methodology or to understand it.
65. As a result, while in the Dickson Letter he said he was relying upon the evidence before the Tribunal, in fact he was relying upon his flawed interpretation of the 2020 Tribunal Decision. And Mr. Dickson misinterpreted what was said in the 2020 Tribunal Decision because he did not understand or accept the evidence provided by Mr. Melidy about his 2004 topographical data and contour map. What Mr. Dickson did not appreciate when giving reasons in the Dickson Letter was that Mr. Melidy's testimony was in fact the evidence before the Tribunal and it is that unchallenged testimony that is reflected in the Tribunal's decision.
66. Mr. Dickson acknowledged that irregularly shaped physical topographical contours are a preferred basis for establishing an area requiring drainage in preference to using property boundaries but nonetheless he used GIS mapping and property boundaries because he gave no credence to the 2004 Melidy topographical map and data. Mr. Dickson did not

obtain any topographical information of his own nor is there any indication that he considered doing so. It is understood that normally a topographical survey is not undertaken until later in the process, but an engineer ignores a petitioner's topographical data and contour mapping at their peril and should be considered deviating from the norm if the petitioner's data demonstrates contours that are materially at odds with the engineer's determination of an area requiring drainage using property boundaries.

67. In Mr. Dickson's evidence, he raised the issue of snow and ice backups along fences in this urban setting as compromising Mr. Melidy's outlet-based contours but, as Mr. Melidy pointed out, snow and ice do not flow, and when snow and ice melt the meltwater flows like the rest of the water in the rear yard of the Araujo's property at 126 Ondrey Street.

What to Do?

68. I recall what I said to Mr. Melidy on March 5, 2022, as quoted in paragraph 25 au-dessus, during the case management video conference that day, extracts of which are as follows:

RJ Burnside is a well-respected engineering firm. Jeff Dixon is a well-respected, seasoned drainage engineer.

And if you do not have a drainage engineer giving evidence that favors your view that your property is the only property requiring drainage, and that, therefore, your signature and your wife's signature are sufficient to make the petition valid in the absence of a different engineering opinion that supports your point of view. I'm going to have little choice but to accept the evidence of Jeff Dixon.

The appellant is entitled to ask good questions, and it's the responsibility of the respondent to provide good answers. And in that case, the answers were so bad that they just didn't accept the answers from the expert.

69. Mr. Dickson is a seasoned, well-qualified drainage engineer who is entitled to great deference with respect to the question of the area requiring drainage for the purposes of section 4 of the *Drainage Act*, particularly in the absence of a differing opinion from a qualified engineer or surveyor. But, if his opinion is patently wrong, it cannot stand.
70. Counsel for the Service Board referred me to the case of *Westendorp v Elizabethtown (Town)* 1986 ONDR 1 (CanLII). That is a decision of Referee Wm. D. Turville issued June 2, 1986 in which at page 13, Referee Turville says the following about an engineer's determination of an area requiring drainage:

His position is quasi-judicial. He need not give evidence as to how he established the area requiring drainage, but only to satisfy this Court of his definition of the area requiring drainage and those owners and their lands that fall within that area.

If this passage is cited for the proposition that an engineer's decision is beyond review, I disagree. If that suggestion is correct, what is the point of clause subsection 106(1)(b) of the Act, which gives the Court of the Drainage Referee original jurisdiction to determine the validity of, or to confirm, set aside or amend

any petition, resolution of a council, provisional by-law or by-law relating to a drainage works under this Act or a predecessor of this Act. There are many cases which have been decided by Referees since this Turville decision in 1986 which have dealt with the question of the validity of a petition turning on the question of the engineer's determination of an area requiring drainage; some have supported the area requiring drainage as determined by the appointed engineer and some have not. The decision of an engineer about the area requiring drainage is entitled to deference but it is not beyond review by the Referee.

71. Counsel for the Service Board referred me to the case of *Jones v Derby (Town)*, 1986 ONDR 3 (CanLII). That is also a decision of Referee Wm. D. Turville issued on December 8, 1986. In his decision, Referee Turville quotes with approval the decision Garrow, J.A. in *Re: Township of Anderson and Townships of Malden and Colchester South* (1912) 8 D.L.R. 812 at 814 concerning the engineer's duty:

“He has necessarily to make a close and careful examination and study of the whole premises, and in his deliberate conclusions ought not, in my opinion, to be disregarded. Except under clear evidence of error, or unless a question of law is involved.”

72. As to the question of clear evidence of error, as I said to the appellants on March 2, 2022, the layperson appellant is entitled to ask good questions and it is the responsibility of the respondent expert to provide good answers. In this case the question is: why are property boundaries being used to prescribe the limits of “areas requiring drainage” as opposed to physical topographical contour features delimiting areas where water ponds for lack of outlet? The answer is, in effect: I ignored the topographical data because I did not do it and have no responsibility for it, so I am at liberty to include areas notwithstanding that those areas are shown by the petitioners' topographical data to be 15 or more inches higher than the elevation of the outlet for those areas. With respect, that is not a good answer and is clear evidence of error.
73. In final submissions by counsel for the Service Board reference was made to Mr. Melidy's speculation about elevations in the rear yard of the Araujo property with no comment at all upon Mr. Melidy's topographical data and contour map. To me that is symptomatic of Mr. Dickson's paradigm that the petitioners' elevation information is irrelevant and can be ignored as if it does not exist. With respect, that is an error.
74. In my mind this case is an urban subdivision version of the *Pannabecker v West Wawanosh*, 2000 ONDR 2 (CanLII) case. This is a decision of Referee D.A. O'Brien issued on June 12, 2000. That case dealt with rural farmland in Huron County. All the properties in the watershed had adequate drainage except one farm where drainage was impeded by a natural ridge of land which served to trap surface flow that would normally continue east. The area behind the outlet-impeding ridge was the area requiring drainage and, in that case, the signature of the owner of that one farm was sufficient to be a valid petition. Here, the impediment to the flow of surface water is the elevation of the Araujo gutter and driveway outlet, and the area of standing water that cannot get to the outlet is the area requiring drainage.

75. In that decision, on page 7, Referee O'Brien says:

It should be noted that "the lands requiring drainage" decision must not only evaluate the objective physical condition of the lands in question, but also must examine the land use factors, all of which together must be weighed in determining which lands require drainage.

76. To those factors of physical characteristics and land use, Referee O'Brien added the element of outlet in his decision in *M&M Farms v. Kingsville (Town)* 2004 ONDR 1 (CanLI) issued September 29, 2004 in which he said at page 12:

It becomes harder and harder to apply the saucer concept to the context of modern farming and it has no application whatsoever if the only requirement is to obtain a legal outlet when one is not available. The second guide referred to in the cases is that of the "physical characteristics" in the *Jones v. Derby* decision of Referee Turville made in 1986 he states:

I am of the view that it is the intention of the present *Drainage Act* that lands not described in the petition as requiring drainage that are subsequently found to require drainage by the engineer in his report to have similar physical features so as to form one area requiring drainage within those lines described in the petition as requiring drainage ...

77. Nowhere in this is there any suggestion that property boundaries are a relevant factor in determining the area requiring drainage for the purpose of section 4 of the *Drainage Act*.

Conclusions

78. I am satisfied that the operating assumption of the parties is correct that there a level of hydraulic connection between the surface water accumulation in the Araujo back yard and the ground water infiltration into the Melidy weeping tile. That conclusion is implicit in the 2020 Tribunal Decision. Despite there being no geotechnical evidence of ground water flows or soil conditions, such as permeability, Mr. Melidy's evidence given to the Tribunal and before me establishes the linkage between precipitation, ponding and his sump pump pumping rates.

79. Like the Tribunal in March of 2020, I am not going to ignore Mr. Melidy's evidence and his topographical data and contour map. Mr. Dickson was wrong in doing so, alternatively, he erred by not doing his own topographical survey work to confirm, or otherwise, Mr. Melidy's data; and he mistakenly used property boundaries instead. Mr. Melidy concedes that his data is not perfect and that there will be a margin of error in the order of a fraction of an inch but says it is a fair representation of the contours of the Araujo rear yard and reflects what can be seen on the ground. I accept Mr. Melidy's theory that the contours of the area requiring drainage are governed by the elevation of the outlet for surface water run-off. Water that reaches the elevation of the outlet will flow off the land; water below that elevation will stand until it evaporates or infiltrates. The contour of the lands at or below the elevation of the outlet is the area requiring drainage. Mr. Melidy does not have sophisticated equipment so has tried to be

conservative in his estimate of the area of the area requiring drainage. It is an area of the rear yard of the Araujo property at 126 Ondrey Street, primarily on the west side next to the covered porch at the rear of the house and around to the side yard between the Araujo and Melidy houses where the outlet to the Araujo gutter and driveway are located. Mr. Melidy conservatively estimates that area on the Araujo property to be no more than 750 square feet.

80. Taking that 750 square feet in the Araujo backyard of 126 Ondrey Street and adding it to the 1,800 square feet of basement area of the Melidy's house at 122 Ondrey Street, the total is 2,550 square feet, 60% of which is 1,530 square feet. On that basis, the Melidy property represents more than 60% of the area requiring drainage as contemplated by subsection 4(1)(b) of the Act. I therefore determine that the Melidy petition is valid.

Service Board's Costs and Expenses in Connection with The Petition

81. Subsection 9(4) of the Act provides that, if a petition is not valid, the engineer's fees are to be paid by the petitioners. Subsection 10(4) of the Act anticipates the withdrawal of names from a petition after council's consideration of a preliminary report and, if the petition is insufficient at that point, the petitioners are to pay the municipality's expenses incurred in connection with the petition. Section 40 of the Act contemplates an engineer reporting that drainage works are not required or are impractical and requires the petitioners to pay the municipality's expenses incurred in connection with the petition. Similarly, section 43 of the Act refers to the withdrawal of names from a petition at the council's meeting to consider the engineer's report; if the petition is insufficient at that point, the petitioners are to pay the municipality's expenses incurred in connection with the petition.
82. Otherwise, the municipality's costs and expenses incurred in connection with the petition are to form part of the cost of the drainage works. In this case, it is likely that the Melidy's will be assessed for a significant portion of the cost of the drainage works.
83. The 2020 Tribunal Decision provides that there is no Order as to costs and that all parties shall be responsible for their own costs. The disposition as to costs in this matter, as appears from paragraph 88 au-dessous, is that the applicants are entitled to their costs on a partial indemnity basis. The intention is that the Town and the Service Board are to bear their own costs and expenses. I want to be clear that sections 9, 10, 40 and 43 cannot be used by the Town and Service Board to recover, indirectly, what the Town and Service Board are not otherwise entitled to recover. In the same vein, allowing the Town and Service Board to add those costs and expenses to the cost of the drainage works would allow the Town and Service Board to recover indirectly through assessments what they are otherwise not entitled to recover.
84. Simply put, the Melidy's should not be responsible for the Town's or the Service Board's costs and expenses incurred in connection with the Tribunal proceeding that resulted in the 2020 Tribunal Decision or in connection with this proceeding in the court of the Drainage Referee either by virtue of being petitioners under subsection 9(4) or under subsection 10(4) or under section 40 or under section 43 of the Act or by virtue of being access for drainage works. Accordingly, I have ordered that the Town's and or the

Service Board's costs and expenses incurred in connection with the Tribunal proceeding that resulted in the 2020 Tribunal Decision or in connection with this proceeding in the court of the Drainage Referee are to be paid out of the general funds of the Service Board. I have also ordered that no part of such costs and expenses are to be charged under subsection 10(4) or under section 40 or under section 43 of the Act to the applicants as petitioners and no part of such costs and expenses are to be charged to the resulting *Drainage Act* project.

85. I hasten to say that there was no suggestion before me by counsel or by any of the Service Board witnesses that the Town or Service Board were proposing to seek recovery of costs and expenses of the Tribunal hearing or of this application in any manner reflected in paragraph 84 au-dessus but, out of an abundance of caution, I want to be clear that they are not to do so.
86. In the circumstances that the Service Board for itself and as agent for the Town did not produce documentation to the applicants as required by the Rules and by Orders of this court such that the applicants took recourse to the FOI to obtain production, the Service Board will forthwith reimburse the applicants for all money paid by the applicants to the Town or to the Service Board for production under the FOI and I have ordered that such reimbursement is to be paid out of the general funds of the Service Board. I have also ordered that no part of such reimbursement is to be charged under subsection 10(4) or under section 40 or under section 43 of the Act to the applicants as petitioners and no part of such reimbursement is to be charged to the resulting *Drainage Act* project.
87. I have also ordered that any amounts already charged or invoiced to the applicants as petitioners under subsection 9(4) of the Act are to be charged to the resulting *Drainage Act* project and any amounts paid by the applicants in that connection will be refunded forthwith by the Service Board. I have also provided that, in the event that there is no *Drainage Act* project, any amounts charged or invoiced to the applicants as petitioners under subsection 9(4) of the Act are to be regarded as costs and expenses of the Service Board in connection with this application to which paragraph 84 au-dessus will apply *mutatis mutandis*.
88. The applicants are entitled to their costs of this proceeding on a partial indemnity basis and whatever is paid by way of costs shall be regarded as costs and expenses incurred by the Service Board in connection with this proceeding in the court of the Drainage Referee to which paragraph 84 au-dessus will apply *mutatis mutandis*.

Closing Thoughts

89. Having made my decision, I am going to make some comments that I hope will provide some guidance to the parties as they move forward. To start, I commend to the parties the comment made by Referee O'Brien at the end of his decision in the *M&M Farms v. Kingsville (Town)* case. He said:

I am compelled to admonish all professionals engaged in the drainage process to conduct themselves with courtesy and civility at all times being

conscious that the procedure is not adversarial in nature, but rather designed to engender cooperation and acceptance.

90. In that context, I reflect upon Mr. Dickson's evidence that in his entire career he has never experienced the level of disrespect he has encountered in this case. I regret that he had that experience.
91. From Mr. Melidy's perspective his approach to Mr. Dickson has been informed by his previous experience with the Town and Burnside Engineering. It started when Mr. Melidy turned to the Town for help about an outlet for his sump pump discharge in 2003 and 2004.
- (a) At the time Mr. Melidy had done enough research to believe that stormwater management for the subdivisions in the area had not been well handled by the Town in its administration and oversight of the residential development. It was, he believed, either that flawed stormwater management plans had been approved or that they had not been properly implemented as part of the subdivision development or perhaps that unauthorized grade changes had been made by subsequent lot owners. These things do not now bear upon finding solutions going forward but reflect what I understand to be Mr. Melidy's state of mind.
 - (b) In 2004 the Town retained Burnside Engineering to investigate and recommend options. The engineer assigned by Burnside Engineering was Gord Feniak, P.Eng. who investigated and issued a report by letter dated May 17, 2004. The letter is four pages in length and concludes that the Town has no responsibility and that Mr. Melidy should either regrade his rear yard to flow to the Town-owned utility corridor to the west or Mr. Melidy should direct this sump pump discharge to that corridor. Mr. Feniak was not appointed under the *Drainage Act* and was operating as the agent of the Town without any of the obligations of an engineer under section 11 of the *Drainage Act*. His mandate was to problem solve for the Town not for the Melidy's.
 - (c) After subdivisions have been assumed and subdivider security released, it is not an uncommon strategy for municipalities, such as the Town in this case, to deny any responsibility for lot grading problems usually on the basis that it has become a private matter between homeowners, or has become a civil liability claim that the municipality can pass on to its insurer; either way getting it off the municipal administrator's desk. The *Drainage Act* is a tool, though an expensive one, that is available to address urban subdivision lot grading shortcomings and ineptitudes which requires the municipality to install, own and maintain drainage works solutions, albeit at the expense of the assessed owners.
 - (d) In this case, after the May 2004 Feniak letter, generally speaking, the Town rebuffed any further overtures by Mr. Melidy for help or to discuss the Feniak letter. The Town's position was that it was a civil matter, as reflected in Mr. Dickson's notes from his September 14, 2020 about the CAO's comments referred to in paragraph 14 au-dessus.

- (e) In September 2019, the Melidy petition was filed, and the Town refused to proceed. At the Tribunal hearing in February 2020 the Town held out the Feniak letter as a Drainage Report and relied upon it as having decided the issue such that no further process was warranted. At that hearing Mr, Melidy was tested about why he hadn't just sued the Town. The Tribunal ordered the Town to proceed with the petition.
- (f) By the time Mr. Dickson came on the scene in September 2020, Mr. Melidy had been rebuffed and thwarted by the Town and regarded Mr. Dickson from Burnside Engineering as another version of Mr. Feniak and so viewed him with distrust and disrespected him on that basis.
92. Mr. Dickson was thrust into this situation without fully appreciating the history and without realizing that Mr. Melidy, though not professionally qualified, had gleaned a great deal of knowledge about drainage matters. Mr. Melidy's disrespect was reciprocated with information and answers, some exaggerated and some not accurately stated, intended to dissuade the Melidy's from proceeding. It also resulted in Mr. Dickson discounting or ignoring whatever information was provided by Mr. Melidy as well as Mr. Melidy not providing some information that might have been useful for fear that it would be manipulated against him.
93. This has to stop.
94. After the evidence was completed, there was an informal dialogue between Mr. Dickson and Mr. Melidy which was civil and collegial and which I believe was helpful, if not for the information exchanged as for the prospect that it laid a foundation of mutual respect in future communications between them. I credit counsel for the Service Board, Mr. Scriven, with creating an atmosphere that was conducive to this exchange. While Referee O'Brien's above quoted comments were focused on professionals, I invite Mr. Melidy to consider himself a profession in this context and for Mr. Dickson to treat him as such. For Mr. Dickson I encourage that he attend to Mr. Melidy's issues and concerns and be prepared to provide him with source policy and guidance documents, formulae for making calculations, for example of capacity of differing pipe sizes, and background information so Mr. Melidy can satisfy himself and engage in technical conversation. For Mr. Melidy I encourage that he be open to discussions of options and that he not read dishonest intent into differences of opinion.
95. I now wish to speak of solutions which will be developed by Mr. Dickson in consultation with Mr. Melidy. It is not my function to deal with the details of drainage works because, by and large, appeals about drainage works go to the Tribunal. I will nonetheless venture a few comments.
96. The initial comment is that Mr. Dickson's task is not to protect the Town from civil liability or to vindicate his colleague Mr. Feniak or to persuade the Melidy's to withdraw their petition. His burden under section 11 of the Act is to use his skill and judgement, without fear or favour, to provide a solution keeping in mind what this case is about. We are not talking about draining the Holland Marsh to open thousands of hectares to

productive agricultural use. We are talking about an outlet for a residential sump pump for a month or two each year during freezing weather conditions when discharge to the street and its storm sewer is prohibited. There needs to be some proportionality between the drainage problem and the solution.

97. Mr. Melidy is concerned about surface water, and specifically, he wants something into which he can discharge his sump pump. He would like to eliminate the ponding in the Araujo backyard because it is contributing to the groundwater flowing into his weeping tile, but he will be able to handle the groundwater that comes to his weeping tile so long as he has an outlet for his sump pump discharge. If I understand the evidence, the most direct approach would involve a municipally owned *Drainage Act* inlet structure on the boundary between the Araujo and Melidy properties to provide outlet for ponded water on the Araujo property as well as outlet for the discharge of sump pumps from both houses; the inlet would be connected by a municipally owned *Drainage Act* lateral to the municipal catchbasin and storm sewer on Ondrey Street where all this water is now going anyway. There should also be a municipally maintained *Drainage Act* overflow swale or gutter to the street somewhere between the Araujo and Melidy houses and driveways; this could incorporate existing swales and gutters if sufficient for the purpose. Whatever it is, Mr. Melidy wants the drainage works to be owned, maintained and repaired by the Town/Service Board under the *Drainage Act*, with the costs of doing so assessed in accordance with an assessment schedule provided in an engineer's report under the *Drainage Act*.
98. There may be some other way that drainage works can alleviate the groundwater infiltration into the Melidy weeping tile question, but my thought is that, so long as Mr. Araujo is provided with a connection at his boundary, even if he does not make the connection, it might be taken into account when Mr. Dickson is considering assessment schedules. Similarly, it may well be that both groundwater and surface water flows from the subdivision block referred to in paragraph 53 au-dessus maybe should be taken into account in the assessment schedules. There is evidence before me about surface water from that subdivision block, but little about groundwater flows. This is something which is for Mr. Dickson to consider, subject to any discussions which may arise before the Tribunal.

To Remain Seized

99. I will remain seized of this matter to give directions as may be desirable until an engineer's report is provisionally adopted by the Service Board, or until the petition is withdrawn if that occurs first. After an engineer's report has been provisionally adopted, the procedures under the Act, including appeals, mostly to the Tribunal, will govern.
100. While section 12 of the Act gives the engineer the authority to examine the land of any person that is relevant to their investigations, it may be helpful to have some direction from me in the event that Mr. Araujo becomes difficult.
101. There will be issues around the timing of the delivery of an engineer's report, and I am particularly thinking of section 39 of the Act. Between section 113 and clause 106(1)(f) of the Act, I am of the view that the presiding Referee has jurisdiction to extend time and

to establish a schedule for engineering work to be completed in order to get to an engineer's report as soon as reasonably possible.

102. Also, and without prejudging the question, I worry about the added cost of a preliminary report, so I would be prepared to give direction in that connection if there is disagreement.
103. I would be concerned if, after receiving a preliminary report, the Service Board decided not to proceed, recognizing that the appeal by the petitioners from such a decision is under subsection 10(6) to the Tribunal. I would also be concerned if Mr. Dickson were to bring in a section 40 report, recognizing that the appeal by the petitioners from such a report is under subsection 48(1)(d) to the Tribunal. Similarly, I would be concerned if, after receiving an engineer's report, the Service Board decided not to proceed to provisionally adopt it, recognizing that the appeal by the petitioners from such a decision is under subsection 45(2) to the Tribunal; that said I observe that section 45 is not on the list of sections referred to in section 101 so a Tribunal decision under section 45 would be amenable to appeal to the court of the Drainage Referee.
104. There may be other questions or disputes that may arise as the parties proceed and I can be available to the parties to arbitrate as may be necessary or desirable.

Dated at London this 25th day of February 2023.

Andrew C. Wright
Acting Drainage Referee